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No. 09-1343

# In the Supreme Court of the United States

J. MCINTYRE MACHINERY, LTD.,

*Petitioner,*

v.

ROBERT NICASTRO, ET UX.,

*Respondents.*

**On Writ of Certiorari to the Supreme Court of New Jersey**

## BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

### INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit corporation with 100 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of a wide array of products, including automobiles, aircraft, electronics, chemicals, pesticides, pharmaceuticals, and medical devices. A list of PLAC's current corporate membership is included in an appendix to this brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability litigation and have potential impact on PLAC's members. This is such a case. Because many of PLAC's members are named as defendants in lawsuits involving products that are distributed in interstate and international commerce, PLAC has a vital interest in the proper interpretation of the stream of commerce theory of *in personam* jurisdiction.

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under S. Ct. Rule 37.6, *amicus curiae* states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

## STATEMENT

On October 11, 2001, Robert Nicastro suffered serious injuries to his right hand while operating a scrap metal shear at his workplace in Saddle Brook, New Jersey. The machine was manufactured by petitioner J. McIntyre Machinery, Ltd., a British corporation based in Nottingham, England. Six years earlier, in 1995, petitioner had sold the machine to McIntyre Machinery of America, Inc. (MMA), an unaffiliated distributor and Ohio corporation that has its principal place of business in Stow, Ohio. Also in 1995, MMA had sold the shear to Mr. Nicastro's New Jersey employer, Curcio Scrap Metal, Inc., and had shipped it to Saddle Brook with the "F.O.B. Point" (where title changes hands) indicated as "Stow, Ohio." Pet. App. 3a-7a; JA 43a; see Ohio Rev. Code §§ 1302.32(A), 1302.42(B).

Alleging that the machine manufactured by petitioner and sold by MMA was defective, Mr. Nicastro and his wife (respondents here) filed suit in 2003 against petitioner in New Jersey state court. Following jurisdictional discovery, the trial court dismissed the case for lack of personal jurisdiction, concluding that petitioner had "no contacts with the state of New Jersey." Pet. App. 130a. The trial court's decision rested on the following findings:

> The record does not reflect *any* activity taken on the part of the defendant in the state of New Jersey. The defendant has no contacts with the state of New Jersey. Defendant . . . does not directly market, sell, nor solicit the business of anyone in New Jersey to buy its products, nor did it ever do so. . . . [D]efendant . . . does not maintain a sales staff in New Jersey, did not

> provide maintenance or repair services for it[s] products to businesses or individuals in N.J. . . . The defendant does not have an office in New Jersey nor does it advertise or solicit sales in this state. The defendant *does not have a single contact with New Jersey short of the machine in question ending up in this state.* The plaintiff alleges that McIntyre Machinery America, Ltd. (MMA) is an Ohio subsidiary of the defendant but fails to produce any evidence as to that fact. Indeed, the evidence is that MMA is *not* a subsidiary of [defendant].

*Id.* at 130a (emphasis added and citations omitted).

The trial court acknowledged that there was disagreement over the proper formulation of the stream of commerce theory of personal jurisdiction, see *Asahi Metal Industry Co.* v. *Superior Court of California*, 480 U.S. 102 (1987), but concluded that this difference in views did not affect the outcome. "[E]ven utilizing the most [lenient] form of the stream of commerce theory," the court reasoned, petitioner "would *not* be subject to personal jurisdiction in New Jersey" because there was "no evidence . . . establishing" that petitioner "had any expectation that its product would be purchased and utilized in New Jersey." Pet. App. 131a-32a (emphasis added); see also *id.* at 135a, 137a (reiterating that New Jersey courts lacked jurisdiction under any version of the stream of commerce theory).

The Appellate Division reversed, Pet. App. 73a-108a, and the Supreme Court of New Jersey upheld the Appellate Division's conclusion that the exercise of personal jurisdiction did not offend due process, *id.* at 1a-72a. The New Jersey Supreme Court began by

acknowledging that petitioner had no "minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case." *Id.* at 14a. Notwithstanding that seemingly dispositive conclusion, the court went on to hold that New Jersey courts could exercise *in personam* jurisdiction over petitioner under the stream of commerce theory, which it viewed as a basis for jurisdiction that was *independent of* the minimum contacts test set forth in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). See Pet. App. 14a, 19a.

First articulated in dicta in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), the stream of commerce theory posits that a state "does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297-98.[2] In *Asahi*, this Court sought to clarify the theory, and in the process offered several different conceptions of purposeful availment through the stream of commerce.

Justice O'Connor, writing for a four-Member plurality, took the view that the "placement of a product into the stream of commerce, without more,

[2] "[B]ecause the example used by the Court was directed at manufacturers and distributors," but "only the retail dealer and regional distributor were contesting jurisdiction" in *World-Wide Volkswagen*, this passage was dicta. *Ruckstuhl* v. *Owens Corning Fiberglas Corp.*, 731 So.2d 881, 887, 889 (La. 1999).

is *not* an act of the defendant purposefully directed toward the forum State." *Asahi*, 480 U.S. at 112 (opinion of O'Connor, J.) (emphasis added). In her view, "something more"—some "[a]dditional conduct of the defendant" and in particular "an action of the defendant purposefully directed toward the forum State"—must be shown before *in personam* jurisdiction may be exercised. *Id.* at 111-12 (emphasis omitted). Without deciding what would be sufficient to permit jurisdiction under the Due Process Clause, Justice O'Connor offered the following observations:

> Additional conduct of the defendant may include an intent or purpose to serve the market in the forum State, for example, [by] designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.

*Id.* at 112.

In an opinion authored by Justice Brennan, another bloc of four Justices took the contrary view that the mere placement of a product into the stream of commerce is enough to satisfy due process—as long as the manufacturer was aware that the "regular and anticipated flow" of the stream of commerce would carry the product into the forum state. *Asahi*, 480 U.S. at 116-17 (Brennan, J.). Finally, Justice Stevens wrote a separate concurrence suggesting that whether or not placement of a product into the stream of commerce satisfies the minimum contacts test turns on "the volume, the value, and the

hazardous character" of the product. *Id.* at 121-22 (Stevens, J., concurring in part and concurring in the judgment).

The Supreme Court of New Jersey adopted a fourth approach. It held that a foreign manufacturer will be subject to personal jurisdiction "if it knows or *reasonably should know*" that products it placed into the stream of commerce "are being sold in New Jersey." Pet. App. 37a (emphasis added). Noting that petitioner targeted sales to the U.S. market generally, the New Jersey Supreme Court concluded that petitioner should have known that its products could be sold "to customers located anywhere in the United States"—a geographical region that necessarily includes New Jersey. *Id.* at 39a-40a. In asserting jurisdiction, the court also emphasized that "transnational commerce had accelerated" since *Asahi* was decided, resulting in a "global marketplace" and "modern economic world" that called for new approaches to personal jurisdiction. *Id.* at 31a; see also *id.* at 35a (citing the "radical transformation of the international economy"), 1a-2a, 33a, 42a. Relying on that rationale, the New Jersey Supreme Court upheld personal jurisdiction over petitioner. Justice Hoens, joined by Justice Rivera-Soto, criticized the majority in dissent for creating "a new test that consists of but one inquiry: whether a product has found its way here." *Id.* at 47a.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The fundamental question presented by this case is whether a defendant's contacts with the nation generally—rather than with a state forum specifically—can satisfy the minimum contacts

requirement, or whether the "new reality" of modern commerce has washed away the federalist notion of dual sovereignties altogether. This Court has consistently held that a state court may exercise specific jurisdiction only where a defendant has purposefully directed activities at that state's residents. The lower court, however, upheld personal jurisdiction on the ground that petitioner, a British corporation that manufacturers industrial shear machines in England, delivered products into a stream of commerce flowing into the United States—a geographical region that *includes* the forum state, but which is of course not commensurate to the state itself. In so holding, the lower court transformed the minimum contacts requirement into a "national contacts" requirement. This Court should reject that novel theory of personal jurisdiction and reaffirm the traditional territorial limitations that have always circumscribed a state's adjudicative authority.

I. To satisfy the minimum contacts requirement, a nonresident defendant must have purposefully availed itself of forum consumers. That requires a specific intent by the out-of-state manufacturer to exploit the state's market—not just mere awareness that a product could ultimately wind up in the forum. Placing a product into the stream of commerce may constitute such purposeful availment, but only where the manufacturer takes additional deliberate actions directed at forum residents. For that reason, Justice O'Connor's plurality opinion in *Asahi*, which requires some indicia of specific intent, is most consistent with this Court's precedents.

The lower court, however, did not even require mere awareness that a product would end up in the

forum state. Rather, it espoused a stream of commerce theory that would support personal jurisdiction where a defendant merely *should have known* that a product it placed into the stream of commerce (presumably, anywhere in the world) *could* ultimately make its way into the forum state. That test—which is based on constructive knowledge—expands jurisdiction well beyond the approach articulated in Justice Brennan's plurality opinion in *Asahi*, which would still require some form of actual knowledge on the part of the manufacturer.

Moreover, even Justice Brennan's broad interpretation of the stream of commerce theory would allow jurisdiction only where a product was actually being *marketed* in the forum state. Here, however, there is no record evidence supporting the proposition that the now-defunct Ohio distributor, McIntyre Machinery of America, specifically advertised or otherwise marketed petitioner's machines in New Jersey, much less that *petitioner itself* deliberately engaged in or directed such efforts, as Justice O'Connor's plurality opinion suggests is required. Petitioner's sole act was selling a shear machine to an independent company with the knowledge that the machine would, if resold, likely end up somewhere in the United States. But knowledge that a product might end up in *some* state—and the mere fact that it does—is a far cry from the purposeful direction toward a *specific state forum* that this Court's opinions have consistently required as a precondition for the exercise of *in personam* jurisdiction.

II. This Court has squarely rejected the notion that state lines are irrelevant for purposes of

personal jurisdiction. That is because the Fourteenth Amendment's restrictions on personal jurisdiction reflect, at bottom, traditional territorial limitations on state power. By basing personal jurisdiction on the fact that petitioner sought to take advantage of the United States market as a whole, rather than the New Jersey market in particular, the lower court effectively erased state lines—contravening the notion of states as independent sovereignties in our federalist system.

Where a federal court seeks to exercise personal jurisdiction over a defendant in a suit arising under federal law, the Fifth Amendment's Due Process Clause may permit personal jurisdiction based on contacts with the nation as a whole. That is only possible because the sovereign territory of the United States spans the fifty states. But where a state court seeks to assert jurisdiction in a case arising under state law, the Fourteenth Amendment's Due Process clause requires minimum contacts between the defendant and that state. Ignoring that fundamental principle, the lower court effectively authorized universal jurisdiction in each and every state without regard to the defendant's specific contacts in *any single one* of those states. That holding eviscerates the territorial limitations on state power rooted in federalism and implicit in the Constitution and in the minimum contacts analysis.

III. In jettisoning the traditional minimum contacts requirement for *in personam* jurisdiction, the lower court pointed to the "new reality" of the contemporary national and international economy. This Court, however, has expressly reaffirmed the continuing validity of the minimum contacts

standard—and its purposeful availment requirement—in the face of the changing economy.

In any event, the "new reality" of the global economy militates *against* rather than in favor of allowing personal jurisdiction over a manufacturer based upon mere awareness that its product could end up in a given state. That is because the changing nature of modern commerce has altered and augmented the traditional manufacturer-distributor paradigm. Now, any individual or company can readily purchase goods and resell them via novel internet-based distribution networks, thereby becoming *bona fide* resellers in their own right. A manufacturer that sells goods in today's economy is surely aware that its products may be resold—sometimes multiple times—via one of these new distribution mechanisms. The growing ease of interstate and international commerce is, if anything, a reason to adhere more faithfully to the requirement that a defendant be shown to have purposefully availed itself of a particular state forum before personal jurisdiction may be exercised.

## ARGUMENT

### I. THIS COURT SHOULD REAFFIRM THAT PERSONAL JURISDICTION MAY BE EXERCISED OVER AN OUT-OF-STATE DEFENDANT ONLY WHERE THE DEFENDANT SATISFIES THE MINIMUM CONTACTS TEST BY PURPOSEFULLY DIRECTING ACTIVITIES AT STATE RESIDENTS

#### A. The Minimum Contacts Test Is The *Exclusive* Test For Specific Jurisdiction

A state court may exercise personal jurisdiction over a nonresident defendant only if that defendant has "certain minimum contacts" with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted). To satisfy the minimum contacts requirement, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

The lower court conceded that petitioner lacked the "minimum contacts . . . that would justify a New Jersey court to exercise jurisdiction in this case." Pet. App. 14a. That should have ended the matter. The court, however, went on to conclude that it could assert *in personam* jurisdiction over petitioner under the stream of commerce theory, which it viewed as a "new theory of state-court jurisdiction" *separate and apart* from the minimum contacts test. *Id.* at 14a, 19a, 42a. According to the New Jersey Supreme

Court, the "contemporary realities of modern commerce" necessitated that departure from the minimum contacts standard. *Id.* at 19a.

This Court has unambiguously explained, however, that—notwithstanding the changing nature of commerce—the "the constitutional touchstone" of whether personal jurisdiction comports with due process "remains whether the defendant purposefully established minimum contacts in the forum State." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474 (1985); see *Asahi Metal Industry Co.* v. *Superior Court of California*, 480 U.S. 102, 108-09 (1987). The stream of commerce test, if satisfied, is simply *one way* that a defendant may establish the requisite minimum contacts; it does not, as the lower court erroneously assumed, allow an end run around that constitutionally mandated requirement.[3]

Having failed to recognize this bedrock principle—that minimum contacts are the *sine qua non* of specific jurisdiction—the lower court lost sight of the dispositive question in this case: whether, by delivering products into the stream of commerce, petitioner "'purposefully directed' [its] activities at residents of the forum." *Burger King*, 471 U.S. at 472 (quoting *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)). More precisely, the question that the lower court failed to address—and which this Court must—is whether, merely by intending to sell

[3] Indeed, both plurality opinions in *Asahi* make clear that delivering a product into the stream of commerce can serve as the basis for personal jurisdiction only if, by so doing, the defendant "purposefully avails itself" of the state market. See *Asahi*, 480 U.S. at 110 (opinion of O'Connor, J.); *id.* at 116 (opinion of Brennan, J.).

its products *somewhere* in the United States, petitioner had purposefully directed its activities *specifically* at New Jersey residents.

### B. Purposeful Availment Requires More Than Constructive Knowledge That Products Might Or Could End Up In A Particular State

Purposeful availment means just that: a *purpose* by the defendant to avail itself of a state's consumers. This Court has explained that, to satisfy this requirement, a defendant must have "deliberately exploited the [state's] market"—a standard akin to specific intent. *Keeton*, 465 U.S. at 781. Jurisdiction is proper, moreover, only where the "contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King*, 471 U.S. at 475 (quoting *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957)). "[R]andom, fortuitous, or attenuated contacts" do not suffice. *Ibid.* (internal quotations omitted). Of the competing approaches in *Asahi*, Justice O'Connor's plurality opinion is the most faithful to these requirements.

The lower court's analysis, in contrast, departs from these governing principles in multiple ways. To begin with, permitting jurisdiction based on mere *awareness* that a product might find its way to the forum would predictably subject defendants to jurisdiction based on the actions of third parties. That result directly contravenes the teaching of both *Burger King* and *World-Wide Volkswagen* that jurisdiction must rest on the *defendant's* purposeful actions, and not the actions of third parties. See

*Burger King*, 471 U.S. at 475; *World-Wide Volkswagen*, 444 U.S. at 295-98.

Nor does mere awareness of the possibility that a product might or could end up in a given state amount to the specific intent necessary to support personal jurisdiction. For that reason, Justice O'Connor's plurality opinion requires additional conduct indicative of such specific intent, such as direct marketing to forum residents or designing a product specifically for use in the forum state. The lower court's decision, however, would not even require awareness, much less purposeful conduct directed to the forum; rather, it would allow jurisdiction based on constructive knowledge—*i.e.*, where the defendant *should have known* that its products might end up in the forum state. See Pet. App. 39a-40a. That threshold is lower than even that articulated in Justice Brennan's plurality opinion, which still requires some form of *actual knowledge* that "the final product is being marketed in the forum State." *Asahi*, 480 U.S. at 117 (opinion of Brennan, J.).

As this Court has explained, "the forseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297. Consistent with that requirement, this Court explained in *World-Wide Volkswagen* that the stream of commerce theory may serve as a basis for personal jurisdiction over a foreign manufacturer only if the manufacturer delivered products into the stream of

commerce with the specific "*expectation* that they will be purchased by consumers in the forum State." *Id.* at 298 (emphasis added).

Here, however, the lower court held that no such expectation is required; rather, it would impose jurisdiction over any foreign manufacturer that should have known that its products *could* end up in the forum state. That standard abandons any semblance of the "purposeful" direction toward forum consumers mandated by this Court's precedents—and by due process. See *Boit* v. *Gar-Tec Products, Inc.*, 967 F.2d 671, 682 (1st Cir. 1992) ("The test is not knowledge of the ultimate destination of the product, but whether the manufacturer has purposefully engaged in forum activities so it can reasonably expect to be haled into court there.") (internal quotations omitted). Notably, the U.S. District Court for the District of New Jersey has expressly rejected the New Jersey Supreme Court's decision in this case as "at odds with" both *Asahi* and *World-Wide Volkswagen*. *Leja* v. *Schmidt Mfg., Inc.*, 2010 WL 4116695, at *14 (D.N.J. Oct. 19, 2010).

### C. The Defendant's Actions In This Case Fail To Qualify As Purposeful Availment And Would Not Satisfy Any Of The Tests Set Forth In *Asahi*

As noted, the only conduct relevant to the minimum contacts inquiry is the defendant's conduct—and whether that conduct is purposefully directed at forum residents. Justice O'Connor's plurality opinion in *Asahi* sets forth several representative examples of conduct that, either singly or in combination, might suffice to establish purposeful direction toward a forum state: "for

example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi*, 480 U.S. at 112 (opinion of O'Connor, J.).

In this case, petitioner's conduct was limited to selecting MMA as its U.S. distributor and selling its machines to MMA. Petitioner neither designed the machines for the New Jersey market nor advertised there. Here, the only potentially relevant consideration of those mentioned by Justice O'Connor in *Asahi* is whether petitioner marketed the product through a distributor who had agreed to serve as the "sales agent" for petitioner with regard to the product in the forum state.

The record, however, reflects no evidence of any distribution agreement between petitioner and MMA—much less one establishing an agency relationship or calling for MMA to sell or advertise petitioner's products in New Jersey. Indeed, there was no written contract of any sort between petitioner and MMA. Accordingly, there is no record evidence that MMA—a wholly independent company—had any obligation (or even intention) to take any action whatsoever in New Jersey, or that either MMA or petitioner made any deliberate sales efforts targeting that state.[4]

[4] See *Bridgeport Music, Inc.* v *Still N The Water Publishing*, 327 F.3d 472, 480 (6th Cir. 2003) (no jurisdiction under stream of commerce theory where defendant did not enter into distribution agreement placing obligation on the distributor to sell goods in the forum or any other state); *Narco Avionics, Inc.*

Nor is this a case in which a foreign manufacturer has "pour[ed] its products into a regional distributor with the expectation that the distributor will penetrate a *discrete*, multi-State trade area"—conduct that some courts have deemed sufficient to justify jurisdiction over the manufacturer in one of the targeted states. *Vandelune* v. *4B Elevator Components Unlimited*, 148 F.3d 943, 948 (8th Cir. 1998) (emphasis added and internal quotations omitted). There is no record evidence that petitioner designed or sold the shear to MMA with any discrete trade area—much less particular state—in mind. Contrary to the lower court's opinion, then, petitioner's actions—selling products to a distributor in Ohio with the hope that the distributor would resell them somewhere in the United States—can hardly be characterized as deliberate "target[ing]" of the New Jersey market. Pet. App. 31a.

The Supreme Court of New Jersey nevertheless upheld jurisdiction on the ground that petitioner placed its product into the stream of commerce through a "distribution scheme" aimed at the U.S. market as a whole. Pet. App. 31a. Justice O'Connor's *Asahi* opinion, however, properly requires far more than that in referring to a foreign manufacturer's decision to "market[] the product through a distributor who has agreed to serve as the sales *agent* in the forum State." *Asahi*, 480 U.S. at 112 (emphasis added); see Pet. App. 32a-33a, 39a. That carefully chosen language does not encompass *every*

v. *Sportsman's Market, Inc.*, 792 F. Supp 398, 408 (E.D. Pa. 1992) (no jurisdiction under stream of commerce theory where foreign company had no control over wholly independent distributor and did not advertise in forum state).

situation in which a manufacturer elects to sell products to an intermediary that in turn agrees to resell them within the forum state. Instead, Justice O'Connor's plurality opinion expressly refers only to those distributors that have specifically agreed to serve as an "agent" for the manufacturer.

Not all distributorships create a principal-agent relationship. On the contrary, most distributorship agreements *expressly disclaim* an agency relationship between the manufacturer and the distributor. See 1 W.M. GARNER, FRANCHISE & DISTRIBUTION LAW & PRACTICE § 3:6, at 90 (2010) ("The dealer or distributor agreement usually provides that the dealer is an independent contractor and that neither party is the agent of the other for any purpose."). Where such an agency relationship is present, the actions of the agent may fairly be attributed to the principal. That is because an agent literally stands in the shoes—and is subject to the control—of the principal. See RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."). As most lower courts have recognized, however, absent such a true agency relationship—including control of the agent by the principal—it is improper to attribute the actions of a distributor to a manufacturer for purposes of establishing personal jurisdiction. See, *e.g.*, *Kuenzle*

v. *HTM Sport-Und Freizeitgeräte AG*, 102 F.3d 453, 459 (10th Cir. 1996) (citing cases).[5]

Moreover, the New Jersey Supreme Court evidently failed to grasp that "distribution schemes" come in a wide variety of forms. See 1 W.M. GARNER, *supra*, §§ 1:11 to 1:31, at 22-36 (distinguishing among and discussing, among other things, distributorships, dealerships, product franchising, consignment operations, agency relationships, and manufacturer's representatives). Even within the category of product distributorships, distribution agreements can be quite complex and varied, the end result of an extensive arm's-length negotiation between sophisticated, wholly independent business entities. Far from being under the manufacturer's control, "[d]istribution systems are frequently independent of the manufacturer of the product or the retailer that sells it to the public." *Id.* § 1:2, at 5.

Judged against this real-world backdrop, sales agents have certain distinctive characteristics that

[5] As explained in the companion case of *Goodyear Luxembourg Tires, SA* v. *Brown*, No. 10-76, this Court's personal jurisdiction cases make clear that "[e]ach defendant's contacts with the forum State must be assessed *individually*." *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) (emphasis added). See Brief of the Product Liability Advisory Council, Inc. as *Amicus Curiae* in Support of Petitioners, *Goodyear Luxembourg Tires, SA* v. *Brown*, No. 10-76, at 27 (filed Nov. 18, 2010). That principle, which generally prevents attribution or imputation to a defendant of the forum contacts of a corporate affiliate, finds additional support in *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925), as well as in well-established background principles of the law governing corporations. See No. 10-76 PLAC Br. 27-28.

set them apart in ways that are important to Justice O'Connor's approach:

> In an agency relationship, an independent business person is deputized as the agent for a supplier, usually in a particular territory. Legally, an agent represents the supplier and stands in its shoes; it usually does not have a separate legal identity from that of the supplier. The agent is responsible for selling the product to customers and for collecting the purchase price. An agent does not bear the risk of loss of the product or of collection from the customer. The agent does not set the price of the product or make any representation with respect to the product separately from the supplier's. The agent will usually be compensated through a salary and commission.

1 W.M. GARNER, *supra*, § 1:29, at 34. Because the sales agent "pays no fee and takes no risk," for example, an "agency relationship is usually not a franchise or dealership." *Id.* § 1:29, at 35.

Here, there is no suggestion that MMA agreed to serve as petitioner's agent or that it was otherwise under petitioner's control. Indeed, the lower court held that "[t]he focus [for purposes of personal jurisdiction] is not on the manufacturer's *control* of the distribution scheme, but rather on the manufacturer's *knowledge* of the distribution scheme through which it is receiving economic benefits." Pet. App. 37a (citing *Charles Gendler & Co.* v. *Telecom Equipment Corp.*, 508 A.2d 1127, 1138 (N.J. 1986)) (emphasis added). Aside from the fact that merely selecting "an entirely distinct, unaffiliated Ohio corporation to serve as its distributor" hardly

qualifies as a sophisticated "distribution scheme" exploited by petitioner, see Pet. App. 61a (Hoens, J., dissenting), the lower court's reasoning simply ignores the plain language of Justice O'Connor's opinion, which requires appointment of an "agent" in the forum state, thus establishing the requisite control to justify haling a manufacturer into court based on the agent's actions there. Despite the lower court's suggestion to the contrary, then, see Pet. App. 32a-33a, its analysis departs sharply from the stream of commerce theory articulated in Justice O'Connor's plurality opinion.

For all the attention surrounding the dueling plurality opinions in *Asahi*, moreover, Justice Brennan's opinion, like Justice O'Connor's, still requires that "the final product *is being marketed* in the forum State." *Asahi*, 480 U.S. at 117 (opinion of Brennan, J.) (emphasis added). Because there is no record evidence even showing that MMA was marketing the shear in New Jersey, much less that *petitioner* directed such efforts or itself deliberately engaged in marketing there, the state court lacks jurisdiction over petitioner even under Justice Brennan's more permissive stream of commerce theory.[6] And given that only four of petitioner's

[6] The lower court stated that a "manufacturer that wants to avoid being haled into a New Jersey court need only make clear that it is not marketing its products in this State." Pet. App. 36a. Aside from seemingly (and impermissibly) shifting the burden of disproving personal jurisdiction to the defendant, see, *e.g.*, *Astro-Med, Inc.* v. *Nihon Kohden America, Inc.*, 591 F.3d 1, 8 (1st Cir. 2009) ("On a motion to dismiss for want of personal jurisdiction, the plaintiff ultimately bears the burden of persuading the court that jurisdiction exists") (citing *McNutt* v. *Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)), that

products evidently have come to rest in the entire state of New Jersey, it is difficult to see how this case could possibly pass Justice Stevens's test, which would find purposeful availment where "a regular course of dealing . . . results in deliveries [in the state] of over 100,000 units annually over a period of several years." *Asahi*, 480 U.S. at 122 (Stevens, J., concurring in part and concurring in the judgment). Petitioner's sole act was selling a machine to a company in Ohio with the knowledge that it would, if resold, ultimately come to rest *somewhere* in the United States. That knowledge fails to qualify as purposeful availment of the New Jersey market under any of the theories enunciated in *Asahi*.

Turning the purposeful availment requirement on its head, the lower court insisted that if petitioner wanted to avoid jurisdiction in New Jersey it should have taken "some reasonable step to *prevent* the distribution if its products in [the] State." Pet. 38a (emphasis added). That theory, however, attaches jurisdiction based not on purposeful action, but rather on *inaction*. Even though petitioner had no distribution agreement requiring MMA to market or sell its products anywhere in the United States, it was apparently still incumbent upon petitioner to enter into a contract expressly barring resale of its products in New Jersey to avoid being haled into court there. That stretches beyond the breaking point this Court's requirement that a defendant's own conduct be "purposefully directed" toward forum residents.

reasoning ignores the fact that petitioner *did* make clear that it had not marketed its product in New Jersey.

### D. Faithful Adherence To This Court's Purposeful Availment Requirement Would Not Necessarily Deprive Product Liability Plaintiffs Of A U.S. Forum

The lower court suggested that applying this Court's purposeful availment requirement would deny any U.S. forum to plaintiffs injured by foreign-made goods distributed by third parties in the United States. That is incorrect. As a general matter, an injured plaintiff can sue the distributor in that company's home state, regardless of whether the foreign manufacturer itself is amenable to personal jurisdiction there. See RESTATEMENT (SECOND) OF TORTS § 402A (1965) (attaching strict liability to anyone "who *sells* any product in a defective condition") (emphasis added).[7] The distributor, of course, may then seek contribution or indemnity from the foreign manufacturer. See also 1 W.M. GARNER, *supra*, § 3:6, at 90 (noting that distribution agreements typically include a provision requiring both parties "to indemnify the other with respect to liability that is caused by the party at fault"). As a practical matter, then, plaintiffs injured by products sold by U.S.-based distributors or dealers are hardly left without a remedy in U.S. courts. Indeed, having sellers and distributors available in the United States as strict liability defendants may even increase the

[7] Those states that depart from Section 402A by prohibiting suits against nonmanufacturing sellers typically still permit such suits where the manufacturer is not subject to personal jurisdiction in the state. *E.g.*, Colorado Rev. Stat. § 13-21-402(2); Kan. Stat. § 60-3306; Ky. Rev. Stat § 411.340, Minn. Stat § 544.41; Wash. Rev. Code § 7.72.040(2).

likelihood of recovery, given the difficulties that can attend the collection of judgments from foreign defendants.

## II. THE MINIMUM CONTACTS INQUIRY PROPERLY FOCUSES ON THE DEFENDANT'S CONTACTS WITH THE FORUM STATE, NOT WITH THE UNITED STATES AS A WHOLE

### A. Merely Targeting The United States Market Does Not Constitute Action Purposefully Directed Towards Residents Of A Specific State

This Court spoke with one voice in *Asahi* regarding one crucial point: to satisfy the minimum contacts test under the stream of commerce theory, the defendant's actions must be purposefully directed toward the "forum State," not the United States as a whole. See *Asahi*, 480 U.S. at 110 (opinion of O'Connor, J.); *id.* at 116 (opinion of Brennan, J.). The lower court, however, upheld personal jurisdiction on the ground that petitioner placed products into a stream of commerce flowing into a geographical area that "*includes* New Jersey," namely the United States as a whole. Pet. App. 31a (emphasis added). Under that theory, selling products to an independent company that serves as a North American distributor (or a worldwide distributor) would render a manufacturer amenable to suit in New Jersey, because New Jersey is part of North America (and the world). Such attenuated contacts, however, are insufficient to support personal jurisdiction.

The only way to avoid this line-drawing problem is to adhere to the one line that has always mattered

for purposes of personal jurisdiction: the state line. See *World-Wide Volkswagen*, 444 U.S. at 293. That requires a showing that the defendant purposefully directed its activities *to the forum state*, not merely to a geographical region that includes the forum state. Moreover, as described in further detail below, by shifting the focus of the inquiry from state contacts to national contacts, the lower court decision ignores deeply rooted federalism concerns underlying the Fourteenth Amendment's Due Process Clause.

### B. Federalism Principles Prevent State Court Jurisdiction Over An Out-Of-State Defendant Based On National Contacts

The restrictions on personal jurisdiction in the state courts "are more than a guarantee of immunity from inconvenient or distant litigation." *Hanson*, 357 U.S. at 251. Rather, "[t]hey are a consequence of territorial limitations on the power of the respective States." *Ibid*; see also *World-Wide Volkswagen*, 444 U.S. at 292 (minimum contacts requirement serves the dual functions of protecting defendant against the burden of litigation and ensuring states "do not reach out beyond the limits imposed on them by their status as coequal sovereigns in our federal system"). For that reason, this Court has expressly rejected the notion that "state lines are irrelevant for jurisdictional purposes"—a proposition that would violate the "principles of interstate federalism embodied in the Constitution." *World-Wide Volkswagen*, 444 U.S. at 293.

By authorizing state-court jurisdiction over every manufacturer that is aware that its product might be sold *somewhere* in the United States, the lower court converted the minimum contacts test into a *national*

*contacts* test. Such a test, if upheld, would effectively erase state lines altogether—in contravention of longstanding federalism principles and this Court's consistent focus on the defendant's contacts with the *forum state* (even with respect to alien defendants).

### C. The Fourteenth Amendment's Due Process Clause Precludes A National Contacts Test For State Law Claims In State Court

The lower court's decision to base *in personam* jurisdiction on national rather than state contacts also violates the Fourteenth Amendment's Due Process Clause. Courts have recognized that where "a *federal court* is attempting to exercise personal jurisdiction over a defendant in a suit based upon a *federal statute* providing for nationwide service of process, the relevant inquiry is whether the defendant has had minimum contacts with the United States." *Busch* v. *Buchman, Buchman & O'Brien, Law Firm*, 11 F.3d 1255, 1258 (5th Cir. 1994) (emphasis added); see also *Pinker* v. *Roche Holdings Ltd.*, 292 F.3d 361, 369 (3d Cir. 2002); *Max Daetwyler Corp.* v. *R. Meyer*, 762 F.2d 290, 293-94 (3d Cir. 1985). Those same courts, however, have held that "where a *state* is attempting to get extraterritorial jurisdiction over a defendant, the inquiry is whether the defendant has had minimum contacts *with the state*." *Busch*, 11 F.3d at 1258 (emphasis added). This crucial distinction reflects the fact that the Fourteenth Amendment's Due Process Clause embodies limitations on state sovereignty that are not present in the Fifth Amendment context. See *Max Daetwyler Corp.*, 762 F.2d at 294 (noting that the interstate federalism

concerns animating the Fourteenth Amendment's Due Process Clause are diminished in the Fifth Amendment context).

Thus, as one influential commentator has noted, "[i]n federal question cases arising in federal courts, a 'pure' national contacts Due Process standard that looks solely to the defendant's contacts with the United States is appropriate." Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 39 (1987). Because the sovereign territory of the United States spans all fifty states, "[i]t necessarily follows that United States territory as a whole should be the relevant geographical unit for purposes of assessing minimum contacts by foreigners in federal question cases." *Id.* at 40.

Jurisdiction of state courts over claims based on state law is an entirely different matter. "*International Shoe* and its descendants impose a constitutional requirement that the defendant have contacts with the *forum state*. Affiliations with sister states, even those geographically adjacent, are inconsequential." Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 145 (1983) (emphasis added). Accordingly, the Fourteenth Amendment precludes "a state legislature from granting to its judicial branch the authority to exercise jurisdiction over an alien defendant on the basis of national contacts," even where the Fifth Amendment would permit such contacts to serve as a basis for personal jurisdiction over a federal question in federal court. *Ibid.*

This constitutional distinction between nationwide and statewide contacts is implicit in Federal Rule of Civil Procedure 4(k)(2), which

authorizes nationwide service of process for claims arising under federal law. Observing that the constitutional limitations on the exercise of personal jurisdiction by federal courts arise from the Fifth rather than the Fourteenth Amendment, the Advisory Committee's notes explain that the "Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party." Fed. R. Civ. P. 4(k) advisory committee's note (1993). Accordingly, "[t]he due process analysis under Rule 4(k)(2) is nearly identical to traditional personal jurisdiction analysis with *one significant difference*: rather than considering contacts between the [foreign defendant] and the forum state, [courts] consider contacts with the nation as a whole." *Holland America Line Inc.* v. *Wärtsilä N. America, Inc.*, 485 F.3d 450, 462 (9th Cir. 2007).

Due process permits states to extend their jurisdictional reach across state lines, but only where the defendant has purposefully directed activities toward the forum state; it does not permit states to ignore state lines altogether by looking to a defendant's contacts with the entire nation. Yet that is precisely what the lower court did here: it upheld personal jurisdiction on the ground that by seeking to exploit the entire U.S. market, petitioner was necessarily aware that its products could be resold in one of the fifty states. In other words, the lower court created universal jurisdiction in all fifty states without regard to the nature or number of contacts in *any single one* of those states. That holding eviscerates the territorial limitations on state power inherent in the minimum contacts analysis. See *Max Daetwyler Corp.*, 762 F.2d at 294 ("[T]he scope of

[the minimum contacts inquiry] necessarily acknowledges that the constitutionality of a state's assertion of in personam jurisdiction reflects territorial limitations on the power of an individual state."). Surely those territorial limitations, rooted as they are in our federalist system and in our Constitution, cannot be so casually cast aside as "outmoded constructs of jurisdiction." Pet. App. 35a.

## III. THE "NEW REALITY" OF THE MODERN ECONOMY MILITATES *AGAINST* ALLOWING PERSONAL JURISDICTION OVER A PRODUCT MANUFACTURER BASED ON MERE AWARENESS THAT ITS PRODUCT COULD END UP IN A GIVEN STATE

This Court has rejected an "awareness" test on the ground that if forseeability alone were the criterion for *in personam* jurisdiction, "[e]very seller of chattels would in effect appoint the chattel his agent for service of process." *World-Wide Volkswagen*, 444 U.S. at 296. Nevertheless, the lower court upheld the exercise of personal jurisdiction based solely on the mere knowledge that a product *could* end up in particular state. Contrary to the New Jersey Supreme Court's suggestion, the "new reality" of interstate and international commerce is not a reason to endorse but rather to reject this extremely watered-down version of the stream of commerce theory.

The implications of the decision below extend far beyond this case and are not difficult to grasp. Consider, for example, a pharmaceutical company that manufactures and distributes drugs for sale solely in Canada. Such a company might reasonably

expect that U.S. citizens will purchase those drugs in Canada and carry them back to their home states. Under the lower court's approach, all such "gray market" goods could serve as a basis to hale a foreign manufacturer into U.S. state court. Indeed, under the lower court's theory, even authorized international distribution—such as through the sale of Japanese-made electronics in foreign duty-free shops—would justify state court jurisdiction over the manufacturer given the forseeability that those goods might eventually make their way to the United States.

An overly broad awareness-based test can also make it easy for plaintiffs to circumvent the rule requiring the jurisdictional focus to remain on the defendant's *own* forum contacts and forbidding attribution of the contacts of other entities, including corporate affiliates. See page 19 & n.5, *supra*. That erroneous approach can lead to the improper assertion of personal jurisdiction over foreign parent companies based on the actions of their domestic subsidiaries. See, *e.g.*, *Anderson* v. *Dassault Aviation*, 361 F.3d 449, 452-53 (8th Cir. 2004). In this case, of course, the distributor of petitioner's shear machine, MMA, was wholly independent. But where a foreign parent company establishes a subsidiary with the knowledge that the subsidiary will place goods into the national market, the parent could be haled into state court under the permissive approach adopted by the lower court, which would effectively attribute the forum contacts of the subsidiary to the parent simply on the ground that the parent was aware of and benefited from such contacts.

Respondents seek to justify that result by pointing to the supposedly "new reality" of the modern economy. But as petitioner correctly points out, the sale of machinery in this case is, at bottom, little different from the sales of machinery and other goods considered over the past half century by this Court. Pet. Br. 31-33.[8] That said, it is certainly true that the changing nature of the national and global economy has brought with it expanded methods and modes of distributing products. Because the world is now "flat," see T. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2006), more commerce occurs without the benefit of a single major distributor, and new and supplemental mechanisms for distributing goods and services have proliferated. Indeed, with eBay, Amazon Marketplace, Craigslist, and the like, any independent purchaser (whether an individual or small business) can readily become an independent distributor in its own right.

A manufacturer who sells products in today's economy is surely aware, then, that its products can be resold via such new distribution networks and marketplaces. As a result of these ubiquitous new distribution mechanisms, under the logic of the lower

[8] Similarly, the history of product franchising and national distribution arrangements in the United States stretches back to the 1850s, well before *Pennoyer* v. *Neff*, 95 U.S 714 (1878), when the Singer Sewing Machine Company devised a novel system for selling its machines through "regional agents" that were "responsible for collection" of the purchase price or rental fees. 1 W.M. GARNER, *supra*, § 1:8, at 15-16; see also *Wilcox & Gibbs Sewing-Machine Co.* v. *Ewing*, 141 U.S. 627, 637 (1891) (upholding franchisor's right of termination of sales agent).

court's opinion universal jurisdiction might be exercised over any company anywhere in the world. And because in today's global economy smaller companies can obtain a broader dissemination of their products through novel distribution agreements and technological advances, the lower court's rationale will surely sweep up small companies as well as large multinationals.

In sum, advances in communication and transportation have made it *easier* not only to sell goods, but also to *resell* goods. And a manufacturer's contacts with the resale market—absent direct efforts to exploit that market—are inherently more attenuated than its contacts with the original purchaser. In today's economy, then, where goods can readily make their way across the globe, it is even more crucial that the personal jurisdiction inquiry focus carefully and exclusively on the *defendant's* direct actions in relation to the *forum* state. Ignoring that guiding principle, the lower court based personal jurisdiction on petitioner's contacts with the nation as a whole, rather than with the forum state. This Court should take this opportunity to reject that interpretation and reaffirm the territorial limitations that have always restricted a state's adjudicatory power.

## CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of New Jersey should be reversed.

Respectfully submitted.

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# APPENDIX

# PRODUCT LIABILITY ADVISORY COUNCIL, INC. LIST OF CORPORATE MEMBERS

3M
Altec Industries
Altria Client Services Inc.
Anheuser-Busch Companies
Arai Helmet, Ltd.
Astec Industries
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Brown-Forman Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire the Americas LLC
Cooper Tire and Rubber Company
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Environmental Solutions Group
Estee Lauder Companies
Exxon Mobil Corporation

Ford Motor Company
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Niro Inc.

Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pella Corporation
Pfizer Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Segway Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Techtronic Industries North America, Inc.
Terex Corporation
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.